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In The

# Supreme Court of the United States

October Term, 1996

CITY OF SANTA ANA,

*Petitioner/Cross-Respondent,*

vs.

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,

*Respondents/Cross-Petitioners.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Does this Court's decision in *Auer v. Robbins*, No. 95-897, 519 U.S. ___, 65 LW 4136, 1997 WL 65558 (Feb. 19, 1997) require reversal of the decision of the Ninth Circuit Court of Appeals in this action vacating the district court's award of overtime pay to the respondents for the period from October 8, 1990, to and until September 6, 1991, on the ground that the Secretary of Labor's "salary basis" regulations defining and delimiting the statutory "white collar" exemptions from the Fair Labor Standards Act could not validly be applied to public sector employers until the Secretary revised those regulations on September 6, 1991, to account for certain conditions of employment unique to the public sector?

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There are no official or unofficial reports of the opinions and orders delivered in this case by the Ninth Circuit Court of Appeals or by the district court.

## JURISDICTIONAL STATEMENT

Respondents/Cross-Petitioners Jess D. Hernandez, et al., respectfully request that the Court grant the Petition and this Conditional Cross-Petition for Writs of Certiorari in this action and that the Court vacate the decision of the Ninth Circuit Court of Appeals and remand this action to the Ninth Circuit for further consideration in light of the Court's decision in *Auer v. Robbins, supra,* 65 LW 4136.

The Ninth Circuit entered its decision in this action on August 12, 1996, affirming in part and otherwise vacating and remanding a district court judgment awarding overtime pay to respondents under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* A copy of the Ninth Circuit's decision is reproduced as Appendix B to the Petition for Writ of Certiorari.

Respondents filed a timely request in the Ninth Circuit for rehearing *en banc* seeking review of the determination not to affirm the district court's judgment in its entirety. The Ninth Circuit issued an order on September 26, 1996, denying the request both as a petition for rehearing and as a suggestion for rehearing *en banc.* A copy of that order is reproduced as Appendix C to the Petition for Writ of Certiorari.

Petitioner City of Santa Ana, the defendant and appellant below, filed its Petition for Writ of Certiorari herein on December 23, 1996. The Petition was not placed on the Court's docket until February 20, 1997, because counsel for the City were not admitted to the Bar of this Court at the time the Petition was filed.

Respondents submit this Conditional Cross-Petition pursuant to and in accordance with Rule 12.5 of the Rules of this Court.

The Court has jurisdiction to review the decision of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves the statutory "white collar" exemptions from the Fair Labor Standards Act, which are set forth at 29 U.S.C. § 213(a)(1), and the "salary basis" regulation set forth at 29 C.F.R. § 541.118(a) to "define" and "delimit" those exemptions.

29 U.S.C. § 213(a)(1) provides as follows:

> (a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to –
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the

> capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities;

29 C.F.R. § 541.118(a) provides as follows:

> § 541.118 Salary Basis
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions

from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates

under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the

> particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

## STATEMENT OF THE CASE

Respondents herein, the plaintiffs and appellees below, filed a complaint in the United States District Court for the Central District of California on October 8, 1992, alleging that Petitioner City of Santa Ana, their employer, had not provided them with overtime pay to which they were entitled under the Fair Labor Standards Act. Appellant's Excerpts of Record (hereinafter "ER"), pp. 1-4. The district court had jurisdiction over plaintiffs' claims pursuant to 29 U.S.C. § 216(b) and the provisions of 28 U.S.C. § 1337 relating to "any civil action or proceeding arising under any Act of Congress regulating commerce."

The City asserted as an affirmative defense that the plaintiffs worked in bona fide executive, administrative and/or professional capacities and, therefore, were

exempt from the FLSA under the statutory "white collar" exemptions set forth at 29 U.S.C. § 213(a)(1). ER, p. 9.

Congress delegated authority to the Secretary of Labor to "define and delimit" the statutory "white collar" exemptions. *See* 29 U.S.C. § 213(a)(1). In the exercise of this authority, the Secretary promulgated regulations establishing two tests that *both* must be met in order for an employee to fall within these exemptions. These two tests are known as the "duties" test and the "salary basis" test. See *Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, *reh. denied*, 499 U.S. 932 (1991).

An employer claiming application of these exemptions for its employees has the affirmative burden of proving the existence of each and every condition of the Secretary's tests for these exemptions. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

A trial was held in this action commencing on October 5, 1993, at which plaintiffs and the City presented evidence on both the "salary basis" test and the "duties" test. In addition, plaintiffs and the City entered into the following stipulation:

> Plaintiffs are subject to discipline for taking any absence from work during their hours of duty without notifying higher authority. Pursuant to the City's Charter, plaintiffs may be suspended from duty without pay for periods of less than one week as a disciplinary measure for reasonable and sufficient cause, which includes,

> but is not limited to, sexual harassment, unexcused absences of more than one day, and other reasons that may or may not be departmental safety rules.

ER, pp. 61-62.

After trial, the district court entered findings of fact and conclusions of law that plaintiffs were entitled to judgment in their favor because the City had failed to meet its burden of proving that they were paid on a "salary basis." ER, pp. 67-73. These findings and conclusions stated in pertinent part:

> It is undisputed that Plaintiffs were subject to suspensions without pay for periods less than one week for reasons other than violation of safety rules of major significance. Therefore, the Court finds that the Plaintiffs were not paid "on a salary basis" within the meaning of the FLSA and its corresponding regulations. Accordingly, the Plaintiffs are entitled to recover the back overtime wages due to them under 29 U.S.C. § 207(a).

ER, p. 72, ¶ 10.

In light of its determination in favor of plaintiffs on the "salary basis" test, the district court stated that it need not consider whether the plaintiffs would be exempt under the "duties" test. ER, p. 73, ¶ 14.

29 U.S.C. § 255(a) provides a two-year statute of limitations for overtime pay claims under the Fair Labor Standards Act. Accordingly, the district court entered judgment after trial awarding overtime pay to the plaintiffs for the period from October 8, 1990, to and until October 2, 1993. ER, pp. 64-66, 68.

The City filed a timely notice of appeal of the judgment to the Ninth Circuit Court of Appeals. ER, p. 74.

While the City's appeal was pending, the Ninth Circuit issued a decision on October 5, 1994, in *SEIU, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), *amended and superseded on denial of rehearing*, 60 F.3d 1346 (1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 774 (1996), that the "salary basis" test was not applicable to State and local governments in its entirety from the time the FLSA became applicable to those agencies in 1985 by reason of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), until the Secretary of Labor adopted new regulations in 1991 and 1992 amending the "salary basis" test to take the special conditions of public employment into account. 60 Fed.3d at 1351, 1353-1354, 1357.

In explanation of this holding, the Ninth Circuit stated that it was arbitrary and capricious, and thus an abuse of discretion, for the Secretary not to have conducted amendatory rulemaking when it first became apparent to the Secretary in 1986 that the "salary basis" test substantially precluded many public employers from availing themselves of the "white collar" exemptions. 60 F.3d at 1357, 1359.

After this Court denied *certiorari* in *SEIU, Local 102*, the Ninth Circuit issued its decision in this case holding, *inter alia*, that its previous decision in *SEIU, Local 102* required it to set aside the district court's award of overtime pay to the plaintiffs for the period prior to the amendatory "salary basis" regulations (October 8, 1990, to September 6, 1991) and to remand the case to the district court for consideration of whether the plaintiffs

met the "duties" test during that period. *See* Appendix B to the Petition for Certiorari, p. B4.

Plaintiffs filed a timely request for rehearing *en banc* seeking review of the Ninth Circuit's determination that the district court's judgment must be modified to conform to the decision in *SEIU, Local 102*. The Ninth Circuit issued an order on September 26, 1996, denying the request both as a petition for rehearing and as a suggestion for rehearing *en banc*. *See* Appendix C to the Petition for Certiorari.

In *Spradling v. City of Tulsa, Oklahoma*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*, 519 U.S. ___, 65 LW 3583 (Feb. 24, 1997), the Tenth Circuit expressly disagreed with and declined to follow the Ninth Circuit's holding that the Secretary of Labor's pre-September 6, 1996 "salary basis" regulations could not validly be applied to the public sector. *Id.*, at 1498. This Court's decision in *Auer v. Robbins, supra*, 65 LW 4136, resolved the conflict between the circuits by specifically disapproving the rationale of the Ninth Circuit's holding in *SEIU, Local 102*. *Id.*, at 4137-4138. It necessarily follows that the Ninth Circuit's decision herein vacating the district court's award of overtime pay to the plaintiffs for the period from October 8, 1990, to and until September 6, 1991, is not in conformity with *Auer* and should be corrected.

## REASONS FOR ALLOWANCE OF THE WRIT

Petitioner City of Santa Ana filed its Petition for Writ of Certiorari in this action on December 23, 1996, approximately two months before the Court issued its decision in

*Auer v. Robbins, supra,* 65 LW 4136. The Petition stated, *inter alia,* that the issues presented therein were already before the Court in *Auer* and that the Court's decision in *Auer* would control the eventual disposition of this case. Petition for Writ of Certiorari, pp. i, 7.

The City's Petition was not placed on the Court's docket until February 20, 1997, one day after the Court issued its decision in *Auer,* because counsel for the City were not admitted to the Bar of this Court at the time the Petition was filed.

After the Court issued its decision in *Auer,* it granted petitions which were pending at that time in *Denver, Colorado v. Carpenter,* No. 95-2088, and *Giuliana v. Yourman,* No. 96-152, for review of decisions of the Tenth Circuit (*Carpenter v. Denver, Colorado,* 82 F.3d 353 (1996)) and Second Circuit (*Yourman v. Dinkins,* 84 F.3d 655 (1996)), respectively, on the same issues decided in *Auer.* In its orders granting the petitions in those cases, the Court vacated the judgments of the Tenth Circuit and Second Circuit and remanded both cases for further consideration in light of *Auer. Denver, Colorado v. Carpenter,* 519 U.S. ___, 65 LW 3581 (Feb. 24, 1997); *Giuliani v. Yourman,* 519 U.S. ___, 65 LW 3581 (Feb. 24, 1997).

As noted in the Petition herein and this Conditional Cross-Petition, this case presents issues over which the circuits were in conflict but which have now been resolved in *Auer,* namely (1) whether a public employer may claim exempt status under the statutory "white collar" exemptions for employees who are "subject to" disciplinary suspensions of less than a full workweek for reasons other than infractions of major safety rules but who have not actually had any such suspensions imposed

upon them (*Auer v. Robbins, supra*, 65 LW 4136, 4138), and (2) whether the Secretary of Labor's "salary basis" regulations defining and delimiting the statutory "white collar" exemptions from the Fair Labor Standards Act could not validly be applied to public sector employers until the Secretary revised those regulations on September 6, 1991, to account for certain conditions of employment unique to the public sector. *Id.*, at 4137-4138. In order that the Ninth Circuit will be provided the same opportunity which this Court has provided the Tenth Circuit in *Carpenter* and the Second Circuit in *Giuliana* to decide other pending cases in the first instance in a manner not in conflict with *Auer*, the Court should grant the Petition and this Conditional Cross-Petition, vacate the judgment of the Ninth Circuit, and remand this case for further consideration in light of *Auer*.

## CONCLUSION

For all of the reasons set forth above, the Court should grant the Petition and this Conditional Cross-Petition for Writs of Certiorari in this action, vacate the judgment of the Ninth Circuit, and remand this case for further consideration in light of *Auer v. Robbins, supra*, 65 LW 4136.

Respectfully submitted,

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